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In The
Supreme Court of the United States

USX CORPORATION; BESSEMER AND LAKE ERIE RAILROAD COMPANY,

Petitioners,

v.

ADRIATIC INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners USX Corporation and Bessemer and Lake Erie Railroad Company respectfully submit this Reply Memorandum to clarify two misconceptions created by the Certain Domestic Insurer Respondents and the London Market Respondents in their respective Briefs in Opposition to USX's Petition for Writ of Certiorari.

First, the Insurers assert that USX's Petition is an attempt to revisit and reargue disputed jurisdictional facts rather than an attack on the erroneous legal conclusions reached by the courts below. Yet, contrary to the Insurers' assertions, the lower courts' opinions are devoid of any factual finding that ICI/Icarom engaged in any public activity on behalf of the Republic of Ireland in 1995. Instead, the courts based their legal conclusion that ICI/Icarom is an organ of Ireland primarily on events that took place a decade earlier. By looking to these dated facts, both lower courts failed to adhere to *Dole Food's* mandate that foreign state status must be examined on the facts as they exist *at the time of removal*.

Second, the Insurers decry as "hyperbole" USX's assertion that the Third Circuit's decision conflicts with *Dole Food* by creating a standard whereby indirectly owned entities routinely will qualify for foreign state status. But the Insurers' briefs reveal that USX's position is reality, not hyperbole. Just like the Third Circuit, the Insurers would confer foreign state status on the same dated indirect ownership facts that fail to confer such status in *Dole Food*. In so doing, the Insurers, just like the Third Circuit, are insisting that facts showing indirect ownership can satisfy the FSIA so long as one simply avoids the ownership prong.

I. The Third Circuit's Reliance On Decade-Old Facts In Conferring Foreign State Status On ICI/Icarom Conflicts With *Dole Food*'s Mandate To Examine Foreign State Status On Facts Existing At The Time Of Removal

The Domestic Insurers' Brief mischaracterizes the record, the factual findings of the lower courts, and USX's argument in support of its Petition. Specifically, the Domestic Insurers' assertion that USX's position is based upon "factual assertions that were rejected by both lower courts. . . ." is erroneous. *See* Domestic Insurers' Brief at 12.

While USX did not (and still does not) contest the undisputed historical facts surrounding ICI/Icarom, USX disputes (and always has disputed) the legal conclusions reached by both the district court and the Third Circuit in holding that ICI/Icarom is an organ of Ireland.[1] The opinions of both lower courts are devoid of any factual finding that, in 1995, ICI/Icarom was engaging in any

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[1] While USX does not contest the undisputed facts of record, it should be noted that the Domestic Insurers' Brief takes considerable liberties with respect to the factual record. For example, while the Domestic Insurers states that ICAROM "has been operated *by the Irish government* solely as a runoff company" the record is clear that the Irish government has never operated ICI/Icarom. (*Compare* Domestic Insurers' Brief at 4 *with* App. at 188). Similarly while the Domestic Insurers state that the legislation in 1985 was "ICI-specific" the record is clear that the 1985 legislation related to the creation and structure of SAT, not ICI. (*Compare* Domestic Insurers' Brief at 4 *with* App. at 183-184). Finally, the Domestic Insurers' contention that the Irish government "has had complete control over ICAROM's financing" misleadingly overstates the factual finding that the Irish government arranged for and monitored certain financing but did not itself finance ICI/Icarom's operations. (*Compare* Domestic Insurers' Brief at 4 *with* App. at 189).

public activity on behalf of the Republic of Ireland. Rather, both courts acknowledge that by 1995, ICI/Icarom was in administration, under the control of the Irish court system, and engaging solely in the activity of running off its remaining liabilities. (App. at 22, 188).

There is no support for the assertion that ICI/Icarom's administration is a "public activity" or that it is being done "on behalf of the Republic of Ireland." In fact, as the record reflects, ICI's board requested that ICI be put in administration before the government indirectly acquired ICI's stock. (App. at 182-183). In addition, while the record is clear that ICI's stock may have been acquired for a national purpose, there is no evidence that ICI's administration was begun or continued in furtherance of any national purpose or public activity.

Despite this undisputed factual record, the lower courts reasoned that ICI/Icarom must be considered an "organ" of Ireland "in perpetuity" because Ireland indirectly acquired ICI/Icarom's shares in 1985. The Third Circuit, for example, concluded that, in operating as a runoff company, ICI/Icarom was "carrying out the undertaking of the government when it intervened in the first instance so that a public financial crisis would be avoided" and that because "Ireland acquired ICAROM to fulfill a specific national purpose . . . ICAROM therefore engages in a public activity. . . ." (App. at 43, 52). The Third Circuit cites to no record evidence or testimony on the 1995 "public activity" in which ICI/Icarom purportedly is engaged on the government's behalf. There is none.

Similarly, while the district court makes the observation that ICI/Icarom "has been administered" for an

important national purpose, it did not base that observation on record evidence of the purpose of the administration. Again, it relied solely on the uncontested facts that the Irish government acquired ICI/Icarom's shares in 1985. (App. at 217). Therefore, there is no dispute that both lower courts reached their conclusions on the pivotal legal issue in the case – *i.e.*, whether ICI/Icarom was engaging in a public activity on behalf of the Republic of Ireland – based on the facts as they existed in 1985 and not by any rigorous analysis of what was happening in 1995.

Finally, the Insurers' insistence that the lower courts looked at the jurisdictional issue as of 1995 does not eliminate the fundamental legal error in their approach. The lower courts indisputably relied on, as the Insurers elsewhere are forced to concede, decade-old facts, predating 1995, to confer foreign state status. Reliance on these decade-old facts in the jurisdictional calculus is in direct conflict with the holding in *Dole Food*.

II. The Third Circuit's Reliance On Indirect Ownership Facts To Satisfy Foreign State Status Conflicts With The Holding In *Dole Food* And Congressional Intent On The Limits Of The FSIA.

In considering organ status here, the Third Circuit gave conclusive weight to facts related to Ireland's indirect acquisition of ICI/Icarom's stock in 1985, rather than focusing on what public activity ICI/Icarom engaged in on Ireland's behalf in 1995. Under the Third Circuit's reasoning, entities like ICI/Icarom, that engage in no public activity on the government's behalf, can qualify for organ

status based on facts surrounding their technical ownership structure. This is a result expressly rejected by *Dole Food* under the ownership prong of the statute and it will, as the Third Circuit expressly recognized, result in a proliferation of cases urging organ status under the FSIA.

The Insurers nevertheless characterize this reality as "hyperbole." (*See* London's Brief at 11). Specifically, London contends that the Third Circuit's opinion will not result in FSIA status for every indirectly owned entity because "[a] foreign government may well have an indirect ownership interest in an entity that serves no particular national purpose." *Id.* But that is precisely the situation here. As of 1995, ICI/Icarom had no national purpose and yet the Third Circuit held it is an "organ" of Ireland. Therefore, facts regarding indirect ownership – which would not be relevant under this Court's holding in *Dole Food* – do indeed become a proxy for organ status under the FSIA in direct contravention of the result reached in *Dole Food*.

While it is true that *Dole Food* did not analyze the organ prong of the FSIA, it is equally apparent that, in light of the FSIA's statutory scheme, the exact same facts that are insufficient to confer federal jurisdiction under the ownership prong cannot, standing alone, confer jurisdiction under the organ prong. As recognized by this Court in *Dole Food*, had Congress intended to confer foreign state status on entities indirectly owned by a foreign government, it would have said so. *See Dole Food Company v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655, 1661 (2003). It did not. Therefore, in keeping with *Dole Food* and Congressional intent, indirect ownership facts should not drive the jurisdictional calculus under the FSIA, and organ status must be reserved for only those entities that

are truly organs of a foreign government because they engage in a public activity on the government's behalf.

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Respectfully Submitted,

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